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No. 793

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

MARK FEIN, *Appellant*

v.

THE PEOPLE OF THE STATE OF NEW YORK

On Appeal From the Court of Appeals of the State of New York

APPELLANT'S PETITION FOR REHEARING

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March, 1967

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Appellant respectfully petitions for rehearing of this Court's order of January 23, 1967, which dismissed appellant's appeal and denied certiorari with the following Per Curiam:

> "The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.
>
> "MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted."

I

In the submissions made to this Court before the order of January 23rd, appellant urged (Jurisdictional Statement, pp. 7-9; Brief Opposing Motion to Dismiss or Affirm, pp. 2-3) that this Court should exercise jurisdiction on appeal, under 28 U.S.C. § 1257(2), because the validity of the New York blue ribbon jury statute (former Section 749-aa of the New York Judiciary Law), under the Federal Constitution, had been drawn in question in the State courts and had been passed upon by the New York Court of Appeals. The District Attorney, on the other hand, urged (Motion to Dismiss or Affirm, pp. 2-3, 9-10) that in the New York appellate courts the blue ribbon jury issue had been presented and decided solely as an alleged denial of appellant's federal constitutional rights (reviewable in this Court only on certiorari) and that this Court should dismiss appellant's appeal as of right for want of jurisdiction.

From the January 23rd Per Curiam decision, it appeared that this Court was not satisfied that the record made sufficiently clear that the validity of the New York blue ribbon statute had been actually passed upon by the New York Court of Appeals. Accordingly, appellant then filed in the New York Court of Appeals a motion seeking clarification on this matter. Specifically, the motion requested the New York Court of Appeals to amend its remittitur, so as to state expressly that the Court of Appeals had necessarily passed upon the question of the validity, under the Constitution of the United States, of the New York blue ribbon jury statute (former Section 749-aa of the New York Judiciary Law) and had determined that said statute was not unconstitutional. Appellant's motion in the New

York Court of Appeals set forth the facts relating to the presentation of the blue ribbon jury issue in the New York courts and in this Court. The motion showed that the record (R. 174A-175A) leaves no doubt that the validity of the New York blue ribbon jury statute, under the Federal Constitution, had been expressly drawn in question by a timely pleading filed by appellant in the trial court in advance of trial. The motion also submitted that the New York Court of Appeals, in deciding the blue ribbon jury question on the authority of *Fay* v. *New York,* 332 U.S. 261, and *Moore* v. *New York,* 333 U.S. 565, must surely have intended to determine that the New York blue ribbon jury statute, which was applied to appellant, was a constitutional statute—that is, that the statute was not subject to constitutional infirmity under the provisions of the Federal Constitution. The motion urged it would be a grave injustice if appellant were to be deprived of his appeal as of right to this Court because of any uncertainty as to whether the issue involving the validity of the statute had been actually decided by the New York Court of Appeals. Accordingly, the Court of Appeals was requested to amend its remittitur so as to state expressly that the validity of the statute under the United States Constitution had been necessarily passed upon.[1]

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[1] Promptly after filing this motion to amend the remittitur in the New York Court of Appeals, appellant, upon a showing that such a motion had been made, applied for and obtained from Mr. Justice Harlan an extension of time to and including March 8, 1967, for the filing of a petition for rehearing in this Court; issuance of this Court's mandate was likewise stayed. The present Petition for Rehearing is being filed within the time as thus extended.

In the New York Court of Appeals the District Attorney vigorously opposed appellant's motion to amend the remittitur. The District Attorney claimed, among other things, that the Court of Appeals had not passed upon the validity of the blue ribbon jury statute. The New York Court of Appeals, however, which was in a position to state authoritatively what it had passed upon, rejected the District Attorney's contention, and unanimously granted appellant's motion on February 21, 1967, issuing the following order:

> "A motion to further amend the remittitur in the above cause to this Court having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is
>
> "ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be further amended by adding thereto the following:
>
> 'Upon the appeal herein there was presented and necessarily passed upon the following question under the Constitution of the United States, viz.: Appellant contended that the order of the trial court, subjecting him to a trial before a special jury rather than a general jury, denied him a fair trial and deprived him of due process and the equal protection of the laws. The Court of Appeals held that the appellant's constitutional rights were not violated and that former Section 749-aa of the Judiciary Law authorizing such a trial is constitutional.' "

The remittitur has accordingly been amended in conformity with this order. As thus amended, the re-

mittitur is set forth in the Appendix to this Petition for Rehearing.[2]

Amendment of the remittitur is an established and accepted means of clarifying such matters which come for review to this Court from the New York Court of Appeals. See, for example, *Willner* v. *Committee on Character,* 373 U.S. 96, 102-106; *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94, 97; *Bakery Drivers Local* v. *Wohl,* 315 U.S. 769, 773; *Cafeteria Union* v. *Angelos,* 319 U.S. 753, 778, and 320 U.S. 293.[3] In the present case the supervening action has expressly confirmed that the New York Court of Appeals did pass upon the constitutionality of the New York blue ribbon jury statute, under the Constitution of the United States, and held that the statute authorizing trial of appellant by a blue ribbon jury is constitutional.

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[2] We have now filed with the clerk of this Court certified copies of the following supplemental record, which reflects the proceedings in the New York Court of Appeals subsequent to this Court's order of January 23, 1967: (1) appellant's Notice of Motion to amend the remittitur, together with supporting Affidavit of appellant's counsel; (2) the District Attorney's assistant's Affidavit in Opposition; (3) the Reply Affidavit of appellant's counsel; (4) the New York Court of Appeals decision of February 21, 1967, granting appellant's motion to amend the remittitur; and (5) the remittitur as amended by the New York Court of Appeals pursuant to its order of February 21, 1967.

[3] Thus in *Bakery Drivers Local* v. *Wohl* this Court originally denied certiorari on the ground that "It does not appear from the record that the federal question presented by the petition was necessarily decided by the Court of Appeals" (313 U.S. 572). An amendment of the remittitur was thereafter obtained from the New York Court of Appeals specifying that the federal question had been necessarily passed upon; and this Court then granted rehearing and granted certiorari (313 U.S. 548). A similar sequence occurred in *Cafeteria Union* v. *Angelos.*

Under these circumstances, this Court's appeal jurisdiction under 28 U.S.C. § 1257(2) has now been plainly shown, and the appeal as of right should be entertained.

We already have set forth (Jurisdictional Statement pp. 29-35; Brief Opposing Motion to Dismiss or Affirm, pp. 2-4) the reasons why the question of the validity of the blue ribbon jury statute is substantial and deserves review by this Court; the reasons why this Court should, on the merits, determine specifically that the five-to-four decisions in *Fay* v. *New York,* 332 U.S. 261, and *Moore* v. *New York,* 333 U.S. 565, no longer reflect the applicable constitutional doctrine; and the reasons why the subsequent course of this Court's decisions—as exemplified most recently by the Court's opinions in *Parker* v. *Gladden,* 385 U.S. 363, 364 (Sixth Amendment) and in *Spevack* v. *Klein,* 385 U.S. 511 (Self-Incrimination Clause of Fifth Amendment, overruling *Cohen* v. *Hurley,* 366 U.S. 117)—shows the marked shift in constitutional doctrine which has occurred. These are the reasons on which we continue to rely, now that the amendment to the remittitur has removed the jurisdictional obstacle to this Court's entertaining appellant's appeal as of right. If the concept of an appeal as of right from a State court still retains meaning, then this present appeal is one which the Court most certainly should hear.

There is also one other supervening circumstance militating in favor of a review by this Court of the merits of the blue ribbon jury issue—whether the issue comes here by appeal or by certiorari. In our Jurisdictional Statement (pp. 32-33) we invited attention to the fact that the outmoded constitutional doctrine adhered to here by the New York Court of

Appeals, in order to affirm appellant's conviction, was in direct conflict with the constitutional principles expressed in the Fifth Circuit's decision in *Labat* v. *Bennett,* 365 F. 2d 698, a decision involving collateral voiding of State court convictions in Louisiana on the ground that the federal constitutional right to an impartial jury representing a cross-section of the community had been violated. In that case the Attorney General of Louisiana now has filed a petition for certiorari, No. 956, *Bennett* v. *Labat,* which is pending before this Court for disposition. If the Court grants certiorari in No. 956, we urge that the Court should, for this reason also, accept the present case and, if practicable, set the two down for argument consecutively. If, on the other hand, the Court denies certiorari in No. 956, the finality of the constitutional principles expressed in *Labat* v. *Bennett* will have become established within the States comprising the Fifth Circuit; and the present case should accordingly be reviewed so that a conflicting set of principles would not be allowed to be used in the State courts of New York to keep appellant imprisoned under a sentence of thirty years to life imprisonment.

II

Our previous submissions to this Court (Jurisdictional Statement, pp. 36-43; Brief Opposing Motion to Dismiss or Affirm, pp. 4-9) developed the reasons why this Court should review on the merits the important constitutional questions arising out of the prosecution's concealment of material evidence and the prosecution's sponsorship of false testimony. (It was on this basis that Judge Fuld had dissented in the New York Court of Appeals.) Subsequent to its January 23rd order in

the present case, this Court rendered two decisions, No. 250, *Miller* v. *Pate,* decided February 13, 1967, and No. 27, *Giles* v. *Maryland,* decided February 20, 1967, which give fresh emphasis to the need for this Court to review the New York Court of Appeals decision here.

In *Miller* v. *Pate* the Court (slip opinion, p. 6) stressed that "More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence", that "there has been no deviation from that established principle", and that "there can be no retreat from that principle". Application of this clear-cut principle in the present case leaves the judgment of the New York Court of Appeals utterly without foundation. Here, as we have shown, the prosecution in bringing about appellant's conviction succeeded in its effort at extensive concealment of evidence material to the defense. But even apart from such concealment, the record makes it plain that the prosecution affirmatively sponsored false testimony by its key witness Gloria and by its own chief investigator, Detective Leman—this being evidence which the prosecutor's own testimony at the post-trial hearing established that he knew to be false (Jurisdictional Statement, pp. 16-20; Brief Opposing Motion to Dismiss or Affirm, pp. 4-7).

Special problems presented by the record in the *Giles* case led to a diversity of views expressed in the several opinions rendered there. But we submit that, in any event, the judgment of the New York Court of Appeals in the present case cannot be reconciled with the opinions expressed by any of the justices, whether in the majority or in dissent, in *Giles.* For example, the

extensive suppression and nondisclosure which the prosecution here indulged in—and the prosecution's related failure to correct the testimony which it introduced, knowing it to be false—bring this case clearly within the principles expressly recognized as controlling by the *Giles* dissenting opinion (slip opinion, p. 15).

Thus the result which the New York Court of Appeals reached here is in direct collision with the principles and the standards most recently expressed by this Court, as enunciated in *Miller* and *Giles*.

In our Jurisdictional Statement (pp. 40-43) we urged that these serious infringements of appellant's constitutional rights were of such a nature that, in the light of the whole record, it must be concluded that the evidence falsified and the evidence concealed by the prosecution "may have had an effect on the outcome of the trial"—to use the test which this Court applied in *Napue* v. *Illinois*, 360 U.S. 264, 272. Hence, we said, the New York Court of Appeals could not be supported in its view that any error on these matters was, somehow or other, not material. This Court's supervening decision in No. 95, *Chapman* v. *California*, decided February 20, 1967, brings even more into focus the fundamental nature of the New York Court of Appeals' departure from the applicable constitutional standards. *Chapman* clarified previous decisions by holding expressly, with respect to State court trials, "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt" (slip opinion, pp. 6-7). Assessed by such a standard, we submit it is clear that the judgment of the New York Court of Appeals must be overturned.

III

Our prior submissions to this Court (Jurisdictional Statement, pp. 44-50; Brief Opposing Motion to Dismiss or Affirm, pp. 9-11) advanced the reasons why this Court should review on the merits the search and seizure issues presented by this record—including the question of appellant's standing to challange the unconstitutional seizure of the chair seized from the warehouse. This question the New York Court of Appeals decided against appellant on the ground that he had "abandoned" the property, even though appellant had been denied the hearing he was entitled to, both under the New York statute and under the Federal Constitution, on the abandonment issue.

Subsequently, on February 20, 1967, this Court granted certiorari in No. 929, *Massachusetts* v. *Painten,* in which the Attorney General of Massachusetts is seeking review of the First Circuit's decision in 368 F.2d 142. The third question presented by the petition for certiorari in No. 929 is: "Does the respondent have standing to assert suppression of abandoned property as evidence?" In view of the fact that this Court now has decided to review such a question on the merits in No. 929, we submit it is highly appropriate that it be likewise reviewed in appellant's case. The two cases together would, indeed, present for the Court a far more complete picture of the ramifications of the issue than would No. 929 alone.

CONCLUSION

For the foregoing reasons, in addition to those previously advanced, rehearing of the order of January 23, 1967, should be granted; probable jurisdiction should be noted; and in any event, either on appeal or on certiorari, the federal constitutional questions presented should be heard by this Court on the merits.

Respectfully submitted,

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March, 1967

CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

BENNETT BOSKEY